

No. 89-978⁽²⁾

Supreme Court, U.S.

FILED

JAN 10 1990

JOSEPH F. SPANIEL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL VON RUECKER,
Petitioner,

vs.

HOLIDAY INNS, INC., RICHARD L. FOWLER,
TOWERS HOTEL CORPORATION, and MADESCO
MANAGEMENT CORPORATION,
Respondents.

On Petition for a Writ of Certiorari
to the Missouri Court of Appeals,
Eastern District

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

DONALD L. JAMES
BROWN, JAMES & RABBITT, P.C.
705 Olive Street, Suite 1100
St. Louis, Missouri 63101
(314) 421-3400

Counsel for Respondents

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	iii
Statutes and Constitutional Provisions Involved	1
Reasons for Denying the Petition	4
Summary of Argument	4
I. The Petition For Writ Of Certiorari Should Be Denied Because The Conviction Requirement Of Subsection 3 Of Section 537.053, R.S.Mo. 1986, Does Not Violate Petitioner's Right Against Self-Incrimination For The Reason That Petitioner Knowingly And Voluntarily Waived His Right Against Self-Incrimination On May 19, 1987	6
II. The Petition For Writ Of Certiorari Should Be Denied Because The Conviction Requirement Of Subsection 3 Of Section 537.053, R.S.Mo. 1986, Does Not Violate Petitioner's Right Against Self-Incrimination For The Reason That The Plain Language Of The Statute Does Not Compel Self-Incrimination	7
A. Standard of Review	7
B. Subsection 3 of Section 537.053, R.S.Mo. 1986, Does Not Compel Self-Incrimination ..	8
III. The Petition For Writ Of Certiorari Should Be Denied Because The Conviction Requirement Of Subsection 3 Of Section 537.053, R.S.Mo. 1986, Is Severable From The Remaining Subsections Of The Statute Which Nonetheless Bar Petitioner's Cause Of Action	10

Conclusion	12
Appendix	A-1

TABLE OF AUTHORITIES

	Page
Cases:	
Alaska Airlines, Inc. v. Brock, 480 U.S. 678 (1987)	5,10
Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam)	11
Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986)	8
Garrity v. New Jersey, 385 U.S. 493 (1967)	9,10
Lefkowitz v. Cunningham, 431 U.S. 801 (1977)	9,10
Lefkowitz v. Turley, 414 U.S. 70 (1973)	9
Malloy v. Hogan, 378 U.S. 1 (1964)	9
Miranda v. Arizona, 384 U.S. 436 (1966)	6
Regan v. Time, Inc., 468 U.S. 641 (1984) (plurality opinion)	8,10
Simpson v. Kilcher, 749 S.W.2d 386 (Mo. banc 1988)	4,8,9,11
United States v. National Dairy Products Corp., 372 U.S. 29, <i>reh. denied</i> , 372 U.S. 961 (1963)	8,10
United States v. Oliver, 525 F.2d 731 (8th Cir. 1975), <i>cert. denied</i> , 424 U.S. 973 (1976)	6
United States v. Vuitch, 402 U.S. 62 (1971)	8
Statutes:	
Section 537.053, R.S.Mo. 1986	<i>passim</i>



No. 89-978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL VON RUECKER,
Petitioner,

vs.

HOLIDAY INNS, INC., RICHARD L. FOWLER,
TOWERS HOTEL CORPORATION, and MADESCO
MANAGEMENT CORPORATION,
Respondents.

On Petition for a Writ of Certiorari
to the Missouri Court of Appeals,
Eastern District

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

**STATUTES AND CONSTITUTIONAL PROVISIONS
INVOLVED**

Statutes:

Section 537.053, R.S.Mo. 1986

1. Since the repeal of the Missouri Dram Shop Act in 1934 (Laws of 1933-34, extra session, page 77), it has been and continues to be the policy of this state to follow the common law of England, as declared in Section 1.010, R.S.Mo., to prohibit dram shop liability and to follow the

common law rule that furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons.

2. The legislature hereby declares that this section shall be interpreted so the holdings in cases such as *Carver v. Schafer*, 647 S.W.2d 570 (Mo.App. 1983); *Sampson v. W.F. Enterprises, Inc.*, 611 S.W.2d 333 (Mo.App. 1980); and *Nesbitt v. Westport Square, Ltd.*, 624 S.W.2d 519 (Mo.App. 1981) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages, rather than the furnishing of alcoholic beverages to be the proximate cause of injuries inflicted upon another by an intoxicated person.

3. Notwithstanding subsections 1 and 2 of this section, a cause of action may be brought by or on behalf of any person who has suffered personal injury or death against any person licensed to sell intoxicating liquor by the drink for consumption on the premises who, pursuant to Section 311.310 R.S.Mo. has been convicted, or has received a suspended imposition of the sentence arising from the conviction, of the sale of intoxicating liquor to a person under the age of twenty-one years or an obviously intoxicated person if the sale of such intoxicating liquor is a proximate cause of the personal injury or death sustained by such person.

Constitutional Provisions:

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life

or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without the due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

REASONS FOR DENYING THE PETITION

SUMMARY OF ARGUMENT

The question presented by petitioner is whether the application of Section 537.053, R.S.Mo. 1986, unconstitutionally violated his right against self-incrimination which is guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Resolution of this question turns on an examination of the provisions of Section 537.053.

Section 537.053 is divided into three subsections. Subsection 1 sets forth the declaration of the Missouri General Assembly that dramshop liability is prohibited in Missouri. Subsection 2 legislatively abrogates three Missouri appellate decisions which created common-law dramshop liability. Subsection 3, the focus of petitioner's constitutional attack, creates a limited exception to the rules of non-liability established by subsections 1 and 2.

Under subsection 3, a cause of action for dramshop liability exists only when the dramshop keeper has been convicted or has received a suspended imposition of sentence. The Supreme Court of Missouri has held this requirement to be a condition precedent to the existence of a cause of action for dramshop liability. *Simpson v. Kilcher*, 749 S.W.2d 386, 389 (Mo. banc 1988). It is an element of the plaintiff's case. *Id.*

In the present case, the trial court dismissed petitioner's action and the Eastern District of the Missouri Court of Appeals affirmed because petitioner could not satisfy the conviction/suspended imposition of sentence requirement of subsection 3. Consequently, before this Court, petitioner seeks to invalidate subsection 3 of Section 537.053 on the ground that the statute violated his right against self-incrimination. In effect, petitioner seeks to prove Section 537.053 unconstitutional in order to pursue his cause of action.

Petitioner's constitutional challenge, however, must fail.

This Court need not consider petitioner's constitutional attack because he knowingly, intelligently, and voluntarily waived his right against self-incrimination by confessing to the unlawful possession of intoxicating liquor prior to his accident. According to petitioner's attorney, the purpose of this waiver was to initiate a criminal investigation against respondents.

Moreover, regardless of petitioner's waiver, his self-incrimination challenge nevertheless must fail. Implicit in his attack is the mistaken assumption that the Missouri General Assembly created a general cause of action for dramshop liability and then, by means of subsection 3, sought to illegally narrow it by requiring potential plaintiffs to waive their right against self-incrimination. On its face, subsection 3 does not compel self-incrimination. Nor does it follow as petitioner suggests that his testimony was absolutely necessary to satisfy the conviction/suspended imposition of sentence requirement.

Finally, subsection 3 is severable from subsections 1 and 2 of Section 537.053. Constitutional review of a statute requires a reviewing court to refrain from invalidating more of a statute than is necessary. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). In this case, subsections 1 and 2 constitute complete, constitutional, legislative enactments prohibiting dramshop liability. Consequently, this Court need not consider whether subsection 3 is constitutionally infirm because if subsection 3 is invalid, it is severable from subsections 1 and 2 which nonetheless bar petitioner's cause of action.

For these reasons, respondents respectfully request this Court to deny the Petition for Writ of Certiorari.

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE CONVICTION REQUIREMENT OF SUBSECTION 3 OF SECTION 537.053, R.S.Mo. 1986, DOES NOT VIOLATE PETITIONER'S RIGHT AGAINST SELF-INCRIMINATION FOR THE REASON THAT PETITIONER KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT AGAINST SELF-INCRIMINATION ON MAY 19, 1987.

Petitioner seeks a Writ of Certiorari from this Court to review the decision of the Eastern District of the Missouri Court of Appeals on the ground that Section 537.053, R.S.Mo. 1986, violated petitioner's right against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Specifically, petitioner contends that the conviction requirement of subsection 3 of Section 537.053, R.S.Mo. 1986, violated his right against self-incrimination because it exposed him to arrest and criminal prosecution by confessing to the offense of unlawful purchase or possession of intoxicating liquor in order to subject respondents to possible conviction. His Petition for a Writ of Certiorari, however, should be denied because petitioner waived his right against self-incrimination on May 19, 1987.

Constitutional jurisprudence recognizes that a person can waive fundamental constitutional rights. *United States v. Oliver*, 525 F.2d 731, 734-35 (8th Cir. 1975), *cert. denied*, 424 U.S. 973 (1976). This includes the right against self-incrimination. *Id.* To constitute an effective waiver of constitutional rights, the waiver must be voluntary, knowing, and intelligent. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

In the present case, petitioner waived his right against self-incrimination on May 19, 1987, when he confessed to the unlawful possession of intoxicating liquor. The record before the Eastern District of the Missouri Court of Appeals included the affidavit of petitioner's counsel. The affidavit

demonstrates, by inference, that petitioner's waiver of his right against self-incrimination was made on the advice of counsel. In particular, the affidavit states:

On May 19, 1987, Csongor Kozak, Mark Menendez and [petitioner] appeared at the St. Louis Metropolitan Police Station, waived their constitutional rights against self-incrimination and confessed to unlawfully possessing intoxicating liquor at the Holiday Inn on or about December 17, 1986. They waived their constitutional rights only because no criminal prosecution would be brought against [respondents] if they did not waive said rights.

Resp. App. A-2.

The record demonstrates that petitioner's statement to the police was voluntary. As found by the Eastern District of the Missouri Court of Appeals: "The statements given by [petitioner] to law enforcement authorities were in furtherance of his effort to secure convictions of the respondents and were unquestionably voluntary." Pet. App. A-7. Consequently, petitioner cannot challenge Section 537.053, R.S.Mo. 1986, on self-incrimination grounds and his Petition for a Writ of Certiorari should therefore be denied.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE CONVICTION REQUIREMENT OF SUBSECTION 3 OF SECTION 537.053, R.S.Mo. 1986, DOES NOT VIOLATE PETITIONER'S RIGHT AGAINST SELF-INCRIMINATION FOR THE REASON THAT THE PLAIN LANGUAGE OF THE STATUTE DOES NOT COMPEL SELF-INCRIMINATION.

A. STANDARD OF REVIEW

In determining whether certiorari should be granted in this case, where the constitutionality of Section 537.053, R.S.Mo.

1986, is at issue, this Court is guided by the principle that a statute, whenever possible, should be construed to uphold its constitutional validity. *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32, *reh. denied*, 372 U.S. 961 (1963). Consequently, when the legislation at issue is subject to differing interpretations, this Court will favor a saving construction which renders the statute constitutional. *United States v. Vuitch*, 402 U.S. 62, 91 (1971). Likewise, when this Court has serious doubts about the validity of a particular statute, the Court will determine whether a construction of the statute, avoiding the constitutional question, is fairly possible. *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 841 (1986). In summary, this Court will exercise its power to review the constitutionality of a legislative act cautiously. *Regan v. Times, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion).

As will be shown, the conviction requirement of subsection 3 of Section 537.053, R.S.Mo. 1986, does not mandate constitutional invalidation. On its face, the statute does not compel self-incrimination.

B. SUBSECTION 3 OF SECTION 537.053, R.S.Mo. 1986, DOES NOT COMPEL SELF-INCRIMINATION.

Implicit in petitioner's constitutional challenge is the mistaken assumption that the Missouri General Assembly created a general cause of action for dramshop liability and then, by means of subsection 3, unconstitutionally narrowed it by indirectly requiring potential plaintiffs to waive their right against self-incrimination.

Rather, as held by the Supreme Court of Missouri, the conviction requirement constitutes an element of a plaintiff's right to bring a statutorily created cause of action for dramshop liability. *Simpson v. Kilcher*, 749 S.W.2d 386, 389 (Mo. banc 1988). As held by the Supreme Court of Missouri, the criminal

conviction requirement of subsection 3 is a reasonable restriction imposed by the Missouri General Assembly on a cause of action which that legislative body created. *Simpson*, 749 S.W.2d at 391.

It no way follows that the testimony of a prospective plaintiff is a prerequisite under Section 537.053, R.S.Mo. 1986, to either the cause of action for dramshop liability or the conviction of the dramshop keeper. Clearly, others could testify to the facts of the sale and, in the case of a minor, to the prospective plaintiff's age.

In the present case, petitioner did not have to give any statements to the police at all. On the night of his intoxication-related accident, he was accompanied by several friends to the bar in question. His friends alone could have provided the information necessary for the authorities to initiate a prosecution.

Petitioner's cited authorities do not authorize a Writ of Certiorari in the present case. For example, petitioner's citation to *Malloy v. Hogan*, 378 U.S. 1 (1964), is irrelevant. In *Malloy*, this Court held that an alleged gambler, ordered to testify before a state inquiry into alleged criminal activities, was entitled to invoke the privilege against self-incrimination. The facts before the Court in *Malloy* did not involve in any way a statute which even remotely violated the right against self-incrimination. Rather, the Court in *Malloy* focused on whether the Fourteenth Amendment prohibits state infringement of the right against self-incrimination just as the Fifth Amendment bars the federal government from denying the privilege. As just demonstrated, this Court's decision in *Malloy* has no bearing on the present case.

Likewise, petitioner's citations to *Lefkowitz v. Turley*, 414 U.S. 70 (1973), *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977), and *Garrity v. New Jersey*, 385 U.S. 493 (1967), are equally inapplicable. In *Turley*, the statute subjected to constitutional scrutiny required public contracts to provide that if a contractor

refused to waive immunity or to testify concerning his state contracts, the contractor's existing state contracts could be cancelled. In *Cunningham*, the statute invalidated required a political party officer to testify concerning the conduct of his office. If the political officer refused, he could be divested of his office and prohibited from holding public office for five years. In *Garrity*, the statute at issue subjected police officers to the choice of forfeiting their jobs or waiving their right against self-incrimination.

In summary, the conviction requirement of subsection 3 of Section 537.053, R.S.Mo. 1986, imposes no similar coercive, threatening, or penalizing effect on the right against self-incrimination. To find a similar constitutional infirmity in the present case would do injustice to this Court's standard of review, namely, that a statute should be construed to uphold its constitutional validity whenever possible. *National Dairy Products Corp.*, 372 U.S. at 32. On its face, subsection 3 of Section 537.053, R.S.Mo. 1986, does not require self-incrimination for a plaintiff to state a cause of action for dramshop liability.

III. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE CONVICTION REQUIREMENT OF SUBSECTION 3 OF SECTION 537.053, R.S.Mo. 1986, IS SEVERABLE FROM THE REMAINING SUBSECTIONS OF THE STATUTE WHICH NONETHELESS BAR PETITIONER'S CAUSE OF ACTION.

A reviewing court will refrain from invalidating more of a statute than is necessary. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). Indeed, a reviewing court has the duty to maintain the constitutionality of a legislative enactment in so far as possible by separating the objectionable provisions from those found to be legally valid. *Id.* Consequently, a legal presumption rests in favor of severability. *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion).

In the present case, petitioner's self-incrimination challenge to Section 537.053, R.S.Mo. 1986, necessarily focuses on subsection 3 which creates a limited cause of action for dramshop liability and which requires a criminal conviction as a condition precedent to state a cause of action. Petitioner's argument ignores subsections 1 and 2 of the statute.

The provisions of subsections 1 and 2 are severable from subsection 3. They are therefore susceptible to constitutional enforcement without reference to subsection 3. In *Simpson v. Kilcher*, 749 S.W.2d 386, 393 (Mo. banc 1988), the Supreme Court of Missouri so held.

Specifically, Section 537.053, R.S.Mo. 1986, discloses two distinct legislative purposes. First and foremost is the prohibition of dramshop liability and the legislative abrogation of several appellate decisions which created common-law dramshop liability. This object is set forth in subsections 1 and 2. Second is the legislative creation of a limited cause of action conditioned on the conviction or suspended imposition of sentence of the dramshop keeper. This purpose is set forth in subsection 3.

Clearly, subsection 3 is severable from subsections 1 and 2. The standard for severability may be stated as follows: Unless it is evident that the legislature would not have enacted those provisions which are in its power, independently of those which are not, the invalid part may be dropped if the provisions which remain are fully operative as law. *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam).

In the present case, the Missouri General Assembly would have enacted subsections 1 and 2 independent of subsection 3. Subsections 1 and 2 demonstrate the Missouri General Assembly's determination to prohibit dramshop liability premised on common-law principles. The enactment of subsection 3, creating a limited, statutory cause of action, is in no way essentially or inseparably connected with the other provisions. It manifests an entirely different legislative purpose and is

therefore severable. For this reason, petitioner's cause of action is barred regardless of whether subsection 3 is constitutionally infirm or not. If subsection 3 is valid, it bars petitioner's cause of action in the present case. If subsection 3 is unconstitutional, subsections 1 and 2 nevertheless preclude his cause.

For these reasons, respondents respectfully request this Court to deny the Petition for a Writ of Certiorari.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Donald L. James
BROWN, JAMES & RABBITT, P.C.
705 Olive Street, Suite 1100
St. Louis, Missouri 63101
(314) 421-3400

Attorneys for Respondents

APPENDIX



APPENDIX

PLAINTIFF'S EXHIBIT 2

STATE OF MISSOURI)
)
COUNTY OF ST. LOUIS)

FIRST AFFIDAVIT OF JOHN F. MULLIGAN, JR.

COMES NOW John F. Mulligan, Jr., being of lawful age, having first been duly sworn upon his oath, and states that the following is true to the best of his knowledge, information and belief.

1. My name is John F. Mulligan, Jr. and at all times relevant to this Affidavit I have been an attorney licensed to practice law in the State of Missouri and I have represented Czongor Kozak, Mark Menendez and Michael Von Ruecker.

2. On December 22, 1986, and December 23, 1986, I had telephone conversations with Assistant Circuit Attorneys John Gruendler and Gary Randall of the Office of the Circuit Attorney for the City of St. Louis regarding prosecution of State liquor law violations occurring on or about December 17, 1986, in the City of St. Louis involving Holiday Inns, Inc. and Michael Von Ruecker. Mr. Gruendler and Mr. Randall said the case should be taken to the St. Louis Metropolitan Police Department for investigation and any appropriate action thereafter. I then contacted the St. Louis Metropolitan Police Department and I was informed that Detective Fred Husman was assigned the case.

3. On January 13, 1987, and February 5, 1987, I had telephone conversations with Detective Fred Husman during which he said Michael Von Ruecker and the two minors he was with at the Holiday Inn on or about December 17, 1986, had to

appear at the St. Louis Metropolitan Police Station and give statements and confessions before he would investigate the matter further. Detective Fred Husman said the three minors would be subject to arrest and prosecution for illegal possession of intoxicating liquor if they confessed to the offense.

4. On May 19, 1987, Czongor Kozak, Mark Menendez and Michael Von Ruecker appeared at the St. Louis Metropolitan Police Station, waived their constitutional rights against self-incrimination and confessed to unlawfully possessing intoxicating liquor at the Holiday Inn on or about December 17, 1986. They waived their constitutional rights only because no criminal prosecution would be brought against Holiday Inns, Inc. and Richard Fowler if they did not waive said rights.

/s/ John F. Mulligan, Jr.

John F. Mulligan, Jr. #34431

225 S. Meramec, Suite 525

Clayton, MO 63105

(314) 727-8910

Attorney for Plaintiff

Subscribed and sworn to before me this 14th day of June, 1988.

/s/ Kelly Cook

Notary Public

My Commission Expires:

April 5, 1991

